This reasoning, however, is erroneous; for it would apply to covenants, and yet covenants pass with part of the reversion. *Twynam* v. *Pickard*, 2 B. & Ald. 105. The true basis for the rule is the law's hostility to a forfeiture.

LEGACIES AND DEVISES — LAPSED BEQUESTS AND DEVISES — PROVISION TO CANCEL A BOND. — A husband and wife joined in a mortgage bond to X. X, for the purpose of benefiting the wife, made a provision in her will cancelling the mortgage. The wife predeceased X. *Held*, that the husband is bound on the mortgage. *Simmons' Estate*, 65 Leg. Int. 406 (Dist. Ct., Pa., July 7, 1908).

A provision in a will cancelling the legatee's obligation on a bond given to the testator lapses on the legatee's predecease of the testator. *Toplis* v. *Baker*, 2 Cox Ch. 118. Nor will the fact that there is a surviving co-obligor prevent a lapse, if that co-obligor is not an object of the testator's bounty. *Maitland* v. *Adair*, 3 Ves. Jr. 231; *Izon* v. *Butler*, 2 Price 34. These decisions are in direct support of the principal case, since the cancellation of the bond was construed as a legacy to the wife. One case has been found, however, which holds that a provision in a will to cancel a bond does not lapse on the legatee's predecease. *Sibthorp* v. *Moxton*, 1 Ves. 48. But that case proceeds on the ground that it was the testator's intent to benefit the legatee's family. The correctness of the decision is very doubtful, for the members of the family are practically made beneficiaries without being mentioned in the will. See *Toplis* v. *Baker*, *supra*. Whatever its merits, it does not affect the present case, for here the sole intent of the testatrix was to benefit the wife.

MORTGAGES — FORECLOSURE — PROVISION FOR ACCELERATION OF DEBT. A mortgage provided that upon a default of thirty days in the payment of interest the mortgagee might elect to treat the whole debt as due. The mortgagor was not actually insolvent, but his affairs were placed in the hands of temporary receivers. The interest became due and the receivers allowed it to remain unpaid thirty days. The mortgagee thereupon sued to foreclose, but the mortgagor, having resumed business on the discharge of the receivers, tendered the interest due. *Held*, that the mortgagee is not entitled to foreclose. *Smith* v. *Lamb*, 59 N. Y. Misc. 568.

A provision of this kind is generally held not to be in the nature of a penalty or forfeiture, but to be valid and enforceable in equity as at law. *Pizer* v. *Herzig*, 120 N. Y. App. Div. 102; *Mobray* v. *Leckie*, 42 Ind. 474. Nor will the tender of interest due bar the mortgagee's right to foreclose. *Swearingen* v. *Lahner*, 93 Ia. 147. Equity, however, will refuse its aid where the enforcement of such a clause would be unconscionable. Accordingly, when the mortgagee has contributed to the default he cannot enforce the stipulation. *De Groot* v. *McCotter*, 19 N. J. Eq. 531; and see *Pizer* v. *Herzig*, *supra*. And although the mere negligence of the mortgagor is no excuse, an honest mistake is ground for relief. *Lynch* v. *Cunningham*, 6 Abb. Pr. (N. Y.) 94; *Martin* v. *Melville*, 11 N. J. Eq. 222. The facts here present a much stronger case for equitable relief. The court in the exercise of the sovereign power of the state has, by disabling the mortgagor from performance, caused the default. Similar circumstances have been held to excuse the non-performance of contracts. *Malcomson* v. *Wappoo Mills*, 88 Fed. 680. *Contra*, *Bolles* v. *Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614. As it was not shown that the mortgagor would suffer by losing his right to foreclose, the decision accomplishes complete justice.

MUNICIPAL CORPORATIONS — ASSESSMENT FOR LOCAL IMPROVEMENTS — VARIANCE FROM CONTRACT AS DEFENSE. — A city council could provide for street improvements only through an ordinance. An ordinance was passed ordering the entire street on which the defendant's property abutted to be paved with brick except that a ten-foot strip was to be paved with crushed granite. A contract in conformity with this ordinance was made, but it was later altered to the extent that the whole street was paved with brick. A subsequent ordinance purported to ratify the improvement as so completed, and an assessment

ordinance was passed. The defendant refused to pay his assessment. *Held*, that he is not liable. *City of Lexington* v. *Walley*, 109 S. W. 299 (Ky.).

A substantial variance from a contract for city improvements will invalidate an assessment therefor. *Scranton Sewer*, 213 Pa. 4. The improvement is then regarded as if made without the authorizing ordinance required by statute as a public safeguard. *City of Excelsior Springs* v. *Ettenson*, 96 S. W. 701 (Mo.). It is usually no defense that the work was not done strictly according to specifications, where the proper authorities have accepted it, but this rule does not apply so as to permit a city to accept an improvement essentially different from the one contracted for. *Gage* v. *People*, 193 Ill. 316. Nor could a subsequent ordinance ratify the work so as to validate the assessment; otherwise that which had to be done by ordinance could in effect be accomplished without that formality. *Hubbell* v. *Bennett*, 130 Ia. 66. But to require literal compliance in every respect where there has been an honest endeavor to perform the contract would allow the assessment to be avoided on technical grounds. See *Lindsey* v. *Brawner*, 97 S. W. 1 (Ky.). Such a course is as open to objection as permitting the city to accept a totally different improvement. Whether in the case considered there was a substantial variance is doubtful. *Cf. City of Lowell* v. *Hadley*, 49 Mass. 180.

NUISANCE — EQUITABLE RELIEF — BILL AGAINST PUBLIC NUISANCE BY INDIVIDUAL. — The defendant, a riparian owner on New York Bay, erected a pier. The complainant, although he showed no special damage, prayed that the defendant be enjoined from obstructing the public right of way between high and low water mark. *Held*, that the complainant is not entitled to an injunction. *Barnes* v. *Midland Railroad Terminal Co.*, 126 N. Y. App. Div. 435. See NOTES, p. 137.

PRESCRIPTION — ACQUISITION OF RIGHTS — PRESCRIPTIVE DAMAGE. — The plaintiffs sought to enjoin the defendant from causing sewage to pass over their oyster beds, alleging as damage that the sale of their oysters had been recently prohibited. The defendant relied on a prescriptive right, proving that sewage had been so passed during the statutory period. *Held*, that the injunction should be granted. *Owen* v. *Faversham Corporation*, 72 J. P. 404 (Eng., Ch. D., June 23, 1908).

In general a natural right is not invaded unless some actual damage is suffered. *Sturges* v. *Bridgman*, 11 Ch. D. 852. An exception is made in the case of water rights, in which any sensible diminution gives a right of action. *Roberts* v. *Gwyrfai District Council*, [1899] 1 Ch. 583. A prescriptive right to commit a nuisance has been acquired when no actual damage was suffered during the statutory period. *Dana* v. *Valentine*, 5 Met. (Mass.) 8. The prerequisite right of action involved in this doctrine is based on either of the fallacious views, that an action must be given to prevent the acquisition of a prescriptive right, or that damage, though not yet actual, may be assumed to exist because of a possible prospective alteration in the use of the property. See *Farly* v. *Gate City Gaslight Co.*, 105 Ga. 323; *Ruckman* v. *Green*, 9 Hun (N. Y.) 225. The general adoption of this rule would entail a constant watchfulness by landowners for possible future damage and much accompanying litigation. And in the absence of such caution prescriptive rights would so multiply as to impair seriously the development of property. This rule, not at all established in this country, the English courts wisely refuse to follow.

PROPERTY — LANDLORD AND TENANT — SURRENDER BY DELIVERY OF KEYS. — A landlord accepted the keys from a tenant who left before the end of his term, but specified that it was only for the purpose of re-letting for the tenant's benefit. He advertised at an increased rental and contracted for extensive alterations to be made at once. He later sued for the rent due after the tenant had vacated. *Held*, that the tenant is not liable. *In re Schomacker Pianoforte Mfg. Co.*, 163 Fed. 413 (Dist. Ct., E. D. Pa.).

A mere delivery of the keys by the tenant to the landlord does not work a surrender of the term. *Newton* v. *Speare Co.*, 19 R. I. 546. But it is settled that